

Finance and Public Administration Committee
Tuesday 16 April 2024
13th Meeting, 2024, Session 6

Scotland's Commissioner Landscape: A Strategic Approach

Purpose

1. The Committee is invited to take evidence in relation to Research Scotland's Report on Commissions and Commissioners in Scotland and the UK, from—
 - Katy MacMillan, Director at Research Scotland.
2. This evidence session is intended to inform the Committee's inquiry into [Scotland's Commissioner Landscape: A Strategic Approach](#).

Background

3. There are seven independent officeholders who are directly responsible to the Scottish Parliament, with their terms and conditions of appointment and annual budgets set by the Scottish Parliamentary Corporate Body (SPCB). They are a mix of commissions, commissioners, or ombudsman, and range from having regulatory, complaints handling, investigatory or advocacy functions—
 - Commissioner for Ethical Standards in Public Life in Scotland,
 - Scottish Biometrics Commissioner,
 - Scottish Commissioner for Children and Young People,
 - Scottish Human Rights Commission,
 - Scottish Information Commissioner,
 - Scottish Public Services Ombudsman, and
 - Standards Commission for Scotland.
4. Legislation creating a patient safety commissioner has also recently been passed by the Scottish Parliament. A further six¹ are being proposed or considered. The Commissioners' budgets form part of the SPCB's own budget which is "top-sliced" from the Scottish Consolidated Fund.
5. In its [Report on the Scottish Budget 2023-24](#), the Committee expressed concerns regarding this potential significant increase in the number of SPCB supported bodies and their associated costs. More recently, the Committee raised these broad concerns during scrutiny of Financial Memorandums (FMs) for Bills

¹ The Parliament is scrutinising Bills that would also see a Victims and Witnesses Commissioner and Disability Commissioner being established. Draft proposals for Members Bills creating an Older People's Commissioner and Wellbeing and Sustainable Development Commissioner are under consideration by Parliament, while the Scottish Government is also looking at the possibility of creating a Future Generations Commissioner and a Learning Disability, Autism and Neurodiversity Commissioner or Commission.

creating the patient safety commissioner (now passed) and a victims and witnesses commissioner.

6. Following informal discussions with the Scottish Government's Public Bodies Support Unit, the Scottish Parliament's Non-Government Bills Unit, and SPCB supporting officials, the Committee launched an inquiry in December 2023 into [Scotland's Commissioner Landscape: A Strategic Approach](#), with the following remit--
 - to foster greater understanding of how the Commissioner landscape in Scotland has evolved since devolution,
 - to enhance clarity around the role, and different types, of Commissioners and their relationships with government and parliament,
 - to establish the extent to which a more coherent and strategic approach to the creation and development of Commissioners in Scotland is needed and how this might be achieved,
 - to provide greater transparency to how the governance, accountability, budget-setting, and scrutiny arrangements work in practice, and whether any improvements are required, and
 - to identify where any lessons might be learned from international Commissioner models.
7. The focus of the inquiry is on SPCB-supported commissions, commissioners and ombudsman only. Other than as wider context, the inquiry will **not** therefore:
 - consider the overall public body landscape,
 - examine the role of those commissioners who report directly to the Scottish Government, or
 - make recommendations on the merits or otherwise of individual commissioners.
8. The inquiry's call for views ran from 11 January until 11 March 2024 and received [23 responses](#).² Questions were grouped around three broad themes: (a) the Commissioner landscape, (b) governance, accountability, and scrutiny, and (c) value for money and the effectiveness of the current approach.
9. SPICe has produced an analysis of the responses received, which is attached at Annexe A, along with the full call for views in its Appendix A. In addition, the Committee received a letter from the Deputy First Minister relating to the inquiry, which can be found at Annexe B.

Research Scotland's findings

10. Research Scotland provides social research and support to public and third sector organisations. Its [Report on Commissions and Commissioners](#) was commissioned by the Scottish Government and published on 15 May 2023. The research involved a literature review and interviews with five commissions and commissioners in Scotland², three of which are directly responsible to the SPCB,

² Mental Welfare Commission for Scotland, Scottish Human Rights Commission, Scottish Public Services Ombudsman, Children and Young People's Commissioner for Scotland, Equality and Human Rights Commission.

one is accountable to Scottish Ministers and the other is an executive non-departmental public body sponsored by the UK Cabinet Office. Interviews were also held with the Older People's Commissioners for Wales and Northern Ireland.

11. The Report's introduction acknowledges that "there is very little published research in Scotland and the UK on commissions or commissioners, and little evaluation exploring the pros and cons of different approaches, powers or ways of working for commissioners". The aim of the research was therefore to—

"... better understand the role of commissioners and commissioners which safeguard and uphold people's rights, what helps and hinders in performing these roles, and how these roles intersect and what lessons can be learned from this".
12. The findings were also intended to inform discussion and consultation about the potential creation of a Learning Disability, Autism and Neurodiversity Commissioner or Commission in Scotland. Chapter 2 of the Report therefore explores the context and views relating to creating that specific Commissioner.
13. Chapter 3 discusses the wider commission and commissioner context. It refers to a paper from the Institute for Government (IfG) on [How to be an Effective Commissioner](#), which suggests that a well-defined but not overly restrictive remit is required as well as clarity on where they fit into the overall landscape. An individual with credibility amongst represented groups and who can manage complicated relationships should be appointed, their independence reinforced, and their recommendations taken seriously. Finally, the IfG highlights that the role should have adequate resources and powers to fulfil their remit.
14. Research Scotland's own findings noted that most interviewees value the powers they have and see these as a key difference between commissioners and campaigning or lobbying bodies. Most felt they had sufficient resources "to bring about change and discharge their duties effectively", but all said they had to prioritise and make difficult decisions. Gaps in powers were highlighted by some interviewees, including the inability to self-initiate inquiries, to make binding recommendations or to share information. While most are content with their governance arrangements, the model of a single commissioner appeared to work well given the clear lines of responsibility and decision-making. There was also some concern amongst interviewees that the creation of new commissioners would limit the powers of existing commissioners in relation to investigation.
15. Interviewees also highlighted different approaches to working with other commissioners or commissioners, with some having a Memorandum of Understanding³ or working agreement⁴ in place, and others working together on a more 'ad hoc' basis. It was stressed that communication was key whatever the arrangement in place. Some interviewees said they also took steps to avoid duplicating the work of others and ensure effective joint working with public sector organisations more broadly.

³ EHRC and SHRC.

⁴ SHRC and CCYPS

16. Most interviewees value their independence from government, with one suggesting that “we’re able to be as critical and openly challenging of government as we need to be because of our legislative underpinning”. Most felt they had developed a positive relationship with the Scottish Government, where their input and expertise is valued, and they are listened to.
17. There were mixed views on whether a commissioner is the best way to address the issues ‘on the ground’ for those with a learning disability, autism or neurodiversity, although there was agreement that additional support is needed in some form. Concerns were raised that “creating commissioners for particular groups would lead to a large number of commissioners and a complex landscape”, with many interviewees highlighting an already complicated picture. Some expressed concern that “people could end up being pushed between commissioners or being unsure which applied to them”. The importance of ensuring that any new commissioner complements rather than duplicates existing activity or take powers away from existing commissioners was also highlighted. One interviewee stated that—
- “The current government is very enthusiastic about commissioners, so it’s becoming very confusing what a commissioner is. There are so many different models now that the phrase commissioner is starting to lose its value in terms of what it is. People are struggling to understand what’s the difference between different commissioners ... The more commissions that are set up, the more it muddies the landscape as to what we’re all actually doing.”
18. Interviewees also suggested that other options for strengthening human rights for people with autism, learning disability and neurodiversity should be considered, including—
- better resourcing bodies that champion disabled people.
 - better resourcing existing commissions and commissioners for human rights and equality,
 - having champions and advocates within public bodies, or
 - supporting good practice through standards, guidance and investing in co-producing of policy and practice with people with autism, learning disability and neurodiversity.
19. Some interviewees suggested that a lead commissioner housed by an existing human rights commission or other organisation may be worth considering, as it could reduce costs through sharing services. Others however suggested this approach might divert resources and dilute the body’s focus on “human rights for everyone”. The Scottish Human Rights Commission (SHRC) has considered some of these issues in more detail in its June 2023 paper [At a Crossroads – which way now for the human rights system in Scotland](#). This paper examines various options such as the creation of new commissions/ers, an alternative commissioner structure at the SHRC, enhanced powers for the SHRC, or enhanced infrastructure for the SHRC.
20. The Report does not attribute views or experiences shared to interviewees, though anonymous quotes are used “to highlight key points”.

Next steps

21. The Committee will continue taking evidence in relation to its inquiry into Scotland's Commissioner Landscape: A Strategic Approach at its next meeting, on 23 April 2024.

Clerks to the Committee
April 2024

The logo for SPICe, consisting of the letters 'SPICe' in a white, sans-serif font on a dark purple background.The text 'The Information Centre' and 'An t-Ionad Fiosrachaidh' in white, sans-serif font on a dark blue background.

Finance and Public Administration Committee
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Scotland's Commissioner Landscape: A Strategic Approach - analysis of the call for views

Introduction

The Finance and Public Administration Committee launched its [call for views](#) on 11 January, which closed on 11 March 2024. The [submissions are published online](#).

The Committee received 23 submissions to the call for views, all of which were from organisations.

Responders were asked 10 questions on the topic of Scotland's commissioner landscape, and a summary of the evidence submitted is detailed below.

The Commissioner model

The first question in the call for views asked respondents why the Commissioner model had been chosen over other approaches such as public bodies. It also asked respondents why they felt there had been a growth in Commissioners in recent years.

The Scottish Biometrics Commissioner summarised the opinion of the majority of respondents when they stated that:

“In summary, the current model seems to have evolved organically over time.”

The themes of independence and accountability were brought up across the submissions to the call for views. Age Scotland noted that:

“We believe that the independence of a Commissioner, compared to a government minister or department, is incredibly important in terms of issue or portfolio outcomes. This model is broadly designed to hold policy makers such as the government and public services to account, and take actions to improve the lives of their constituent group.”

The Human Rights Consortium Scotland shared a similar view, stating:

“There is a very significant accountability gap in Scotland... Commissioners for particular groups are often seen as an effective tool to hold those with power accountable for their actions or inaction to address ongoing violations of human rights.”

These viewpoints were brought together by the Carnegie UK Trust, who discussed the fact that

“the Scottish Parliament is unicameral. The independent accountability and scrutiny function of Commissioners is important in this context. They act as an additional accountability mechanism and contribute to a landscape of robust oversight”

Of those responses that suggested reasons for the growth in the number of Commissioners in recent years, the majority shared opinions similar to that of Alzheimer Scotland who said:

“We believe that this indicates the current failing of authorities and public bodies to deliver their functions and meet the needs of the populations that they serve. People often seek to engage Commissions and Commissioners when they feel that they are not being well-served and when they feel that they are not being listened to when they seek resolution to their concerns and complaints.”

The Scottish Public Services Ombudsman noted in their response that:

“My observation is that the growth in the number (or proposed number) of Scottish Parliamentary Supported Bodies (SPSBs) is driven by a strongly held perception that the only way to guarantee independence from Government is to create an SPSB. I have some sympathy with this view but would argue that this is not the case in practice. This presumption of how to achieve independence, has, in my view had the unintended consequence of there being little or no consideration of alternative models for achieving independence and accountability through other statutory measures.”

Implications of growth

Responders were next asked to comment on the implications of the growth in the number of Commissioners, including on areas such as finance, other organisations, and wider society.

The majority of comments related to the financial implications of the growing number of Commissioner roles. The Health and Social Care Alliance Scotland (the ALLIANCE) noted the financial impact on the Scottish Parliament budget:

“Whilst the total budget for parliamentary Commissioners... represents only a very small proportion of public expenditure in Scotland, it represents one-eighth (12.4%) of the entire budget for the Scottish Parliament as an institution ... Even if this growth is appropriately accounted for in the overall Scottish Budget each year, it will nonetheless add significantly to the responsibilities of the SPCB which may not necessarily have the capacity or scope to properly manage the separate budgets of an increasing number of Commissioners.”

The Scottish Public Services Ombudsman also commented on the resources required for additional Commissioners:

“In a small jurisdiction like Scotland, it is important that we have sufficient institutions to provide high quality scrutiny and accountability, but we also need to be sure that the systems we have are efficient and effective, and complement, not replace, the role of Parliamentary scrutiny... Increasing the number of different Commissions/ers at a time when public resources are tight means that the resourcing and structure of some of the proposed Commission/ers may not be proportionate or adequate for the roles and the issues they are trying to resolve.”

Some of the respondents, including the Scottish Biometrics Commissioner, shared the view that:

“the current model provides good value for the public purse, although I also believe that further savings could be achieved through the development of a more coherent and strategic approach where certain prescribed back office functions are in essence centralised as the model and landscape evolves in future”

The submission goes on to suggest that “It would be a dangerous path for Scotland to view the value of independent officeholders solely through the lens of their operating costs.” This was an opinion shared across many of the responses which highlighted the impact of the growing number of Commissioners on society more broadly. For example, Alzheimer Scotland stated that:

“the financial impact of an increasing number of Commissions or Commissioners cannot merely be seen as a numbers game. The financial cost of this changing landscape must be considered against improved outcomes, both financial and non-financial, for the people being served by each Commission or Commissioner. An assessment of the cost implications against the potential benefits and risks associated with the outcomes achieved by these bodies must be considered when looking at the strategic allocation of funds.”

Fewer submissions discussed the impact of a growing number of Commissioners on other organisations. Fife Council did note that:

“There are resource implications for local authorities dealing with a broad range of regulatory requirements... Local authorities operate under a number of statutory duties and the additional benefits a commissioner brings in terms of those existing duties is not always clear.”

This view was supported by SOLAR (The Society of Local Authority Lawyers & Administrators in Scotland) whose submission suggested:

“that an important part of such a review should be to take account of the impact on Council resources in light of the significant budgetary pressures within local government. In particular, there are concerns that timescales for responses are no longer sustainable and that these should be considered as part of the review process. The potential addition of a number of new commissioners could further add to these resourcing pressures”

The Children and Young People's Commissioner Scotland highlighted the impact on existing Commissioners:

“We recommend particular attention and scrutiny to avoid unnecessary overlap and duplication in functions.... There are concerns that the proliferation of Commissioners offices will be a costly exercise and may not provide good value for money for taxpayers, especially if there are multiple bodies tasked with intervening on similar or identical matters. The expected creation of additional Commissioners across a range of discrete policy areas may impact on the availability of budget and resources for offices like ours which have broader roles and remits linked to the international human rights framework.”

Future approach

The third question was asked in two parts and focussed on creating a coherent and strategic model for Commissioners in Scotland. The call for views first asked what the role of Commissioners should be and whether they should report directly to Parliament.

There was a general consensus that reporting directly to Parliament was a preferred component in the role of Commissioners. Alzheimer Scotland stated that:

“We welcome the Scottish Parliament’s role in ensuring that Commissions and Commissioners remain responsive to the needs and interests of the people they serve. We believe that the Scottish Parliament has the ability to provide the necessary checks and balances that ensure that Commissioners operate effectively with their existing frameworks, adhering to standards and without overstepping their authority.”

Age Scotland concurred with this view, suggesting that:

“We believe that it should be part of the role of particular Commissioners to report directly to the Scottish Parliament and be held accountable by it, however, feel that they should also be accountable to the public in terms of their actions, activities and outcomes.”

In their submission, the Scottish Biometrics Commissioner stated the opinion that the Scottish Parliament could have stronger oversight of Commissioners than it does now:

“Although all Commissioners/Commission/Ombudsman report to the Scottish Parliament, not all align directly with a Parliament Committee. This means that the oversight exercised by the Parliament of the independent officeholders can range from thorough to superficial...In my view there are opportunities for the Parliament (as distinct from the SPCB) to be far more proactive in both supporting its officeholder's and at the same time properly holding them to account.”

In terms of the wider role of Commissioners, the Scottish Public Services Ombudsman suggested that:

“What the individual model should be is largely driven by what outcomes they are expected to deliver. The coherence of approach is not necessarily about having identical or similar models, but more about approaching the selection of the model in a more strategic and coherent way each and every time before a solution is proposed... Not all SPSBs need to have similar functions or powers, but they need to have a similar, fundamental relationship with the Parliament. It is not necessarily about the methods used to deliver functions (investigatory, rights or policy-based for example) but whether the function is in support of Parliament or whether there are international standards or structural reasons that require an SPSB. It should not be forgotten that ultimately MSPs and the Parliament have the role of holding Government to account. An SPSB should not replace but support and enhance that role.”

The Health and Social Care Alliance Scotland expressed the viewpoint that there was a distinct difference between the role and powers of individual Commissioners:

“Taking the current Commissioner landscape into account, the ALLIANCE would suggest there should be a clearer distinction drawn between the role and the powers of Commissioners. The exact powers available to a given Commissioner should of course relate to their specific role, with an appropriate degree of flexibility rather than taking a one size fits all approach. Nonetheless, Commissioners would benefit from greater coherence and consistency than exists at present, as well as more certainty that they will have sufficient resources to fulfil their role and use these powers effectively.”

The second part of question three in the call for views asked respondents if the current model of Commissioners is a coherent approach, as well as what improvements could be made to ensure the approach was both coherent and strategic. It should be noted that the majority of submissions did not provide an answer to this question.

Of those who answered the question, the general feeling expressed was that:

“It is not a coherent approach and therefore a review of the landscape is welcome.” (Fife Council)

Alzheimer Scotland suggested that one approach would be to amend the role of existing Commissioners, rather than to continue creating new ones:

“With a review of the existing landscape, it is possible that there is a case for strengthening the role of existing structures that promote the rights of the broadest groups of individuals, specifically the Scottish Human Rights Commission (SHRC). Human rights are embedded across a range of policy and practice across Scotland and the SHRC have a role to play in ensuring that these rights are realised for everyone. By looking to reinforce their role in protecting the rights of all individuals, including those with protected characteristics, there may be scope to better promote the rights of individuals who might otherwise seek support from other Commissions.”

There was also however a number of responses that highlighted the fact that a move towards coherence should not come at the expense of ensuring Commissioners have the powers they need for their differing roles. For example, Scotland's International Development Alliance stated that:

“We understand the desire for more coherence across the Commissioner landscape. However, it is important to note that a Future Generations Commissioner, is not a rights-based commissioner, and therefore may require a different approach.”

The Carnegie UK Trust also noted that:

“It is important that future decisions are coherent and strategic, but legitimate proposals should not simply be dismissed because there are already a number of Commissioners and Commissions in operation.”

The Children and Young People's Commissioner Scotland focussed on both the need to ensure that there is not overlap in the Commissioner landscape, and highlighted that it may not be desirable to change the role of existing Commissioners to ensure more coherence:

“Currently, a range of proposed new Commissioners have been tabled. There is little evidence of coherence to the approach. There is also little evidence of consideration about how new Commissioners would work together or be resourced... If there is overlap in functions, alongside our existing duty not to duplicate work, our independence and ability to work on the priorities identified by children and young people will potentially be compromised.

It would be further compromising to our independence to try and retrofit our model to a newly created template for Commissioners as part of creating a more coherent system. Creating a set of guidelines or coherence between different types of Commission will not work with our model, we are intentionally designed to be different and centred around children and young people.”

Finance Committee Criteria

In Session 2 the Finance Committee [developed criteria to help guide the Scottish Government and Members when making decisions on whether to create a new commissioner](#). Question four asked respondents about how these criteria are working in practice, and whether they had suggestions for improvements.

There were some opposing views expressed in answer to this question. The Scottish Biometrics Commissioner stated that:

“The existing criteria seems to have worked well between 2000 and 2024...It is important that the same criteria are applied in future and that there should always be a presumption against creating new Commissioner's unless deemed entirely necessary by the Parliament...In my view, there are also opportunities for the Parliament to strengthen post-implementation review arrangements and to keep all independent officeholder functions under periodic review to determine whether the original policy objective is still relevant.”

On the other hand, the submission from the Scottish Public Services Ombudsman noted:

“That there is the potential for further proliferation suggests that further work is needed to review and develop the criteria to meet a much-changed public sector delivery landscape, and the differing Commission/er models... While they remain in essence appropriate, my view is there is an opportunity to adapt and modernise them so that the right questions are asked before a Commission/er model is proposed. For example (drawing on the response to the previous question), if the new body is being established as part of Government policy, should the default be that it is a Governmental organisation so that Parliament can hold Government to account for delivery?”

The ALLIANCE discussed the fact that some of the proposed new Commissioners have arisen from Member’s Bills that are yet to go through the Parliamentary scrutiny process. Their opinion was that the Committees working on these Bills should make reference to the criteria when reporting at Stage 1. They also suggested that:

“the Committee may wish to consider outlining some of the powers that proposed Commissioners may be granted. These could include both “standard” powers, that would be expected to be held by any Commissioners, and “additional” powers, that would give flexibility to tailor a given Commissioner to their particular area of focus.”

Another option for improving the criteria was submitted by the Children and Young People's Commissioner Scotland who suggested:

“considering to what degree their remit requires to be fully independent of Scottish Government and what the appropriate relationship is with the wider public sector. Functions might be more appropriately added to the remit of existing organisations, or alternative less resource intense models considered.”

The Law Society of Scotland response offered the opinion that further research into the effectiveness of the criteria was required:

“To assess how the criteria are working in practice would involve a significant review of the parliamentary passage of each bill which produced a Commission/er. It has not been possible to conduct such research but perhaps the Committee could do so?”

Governance and oversight

At this point in the call for views, the questions moved to the topics of governance, accountability, and scrutiny. The fifth question asked respondents for their views on existing governance and oversight arrangements, and whether improvements are required.

The different Commissioners who responded were generally satisfied with the existing arrangements. The Children and Young People's Commissioner Scotland stated that:

“We consider the current governance arrangements in place for our office are robust and appropriate. They provide accountability whilst maintaining the essential independence of the role and enabling the Commissioner to be part of the wider international children’s rights system.”

Other Commissioners were mainly in agreement with this view, with the Standards Commission for Scotland noting that it “considers its governance and oversight arrangements.. to be adequate.”

They did however suggest a number of ways that governance and oversight could be improved. The Scottish Information Commissioner shared that:

“The arrangements for audit work well however I do question the value for money of each commissioner paying for separate audits when all the Commissioners could perhaps be covered under one single audit (with commissioners being considered as distinct ‘departments’).”

The Scottish Biometrics Commissioner suggested that:

“relevant Committees of the Parliament should be more proactive in both supporting Commissioner's and equally in holding them to account. Under current arrangements, when Commissioner's lay their audited annual accounts before Parliament, it is unusual for Parliament to them take much interest unless something goes wrong... Better oversight by the Parliament should be the norm and should also acknowledge effective practice.”

While none of the responses criticised the existing governance arrangements, there were further ideas for improvement put forward from most of the other organisations who answered this question. For example, the Law Society of Scotland recommended that:

“The SPCB has a scheduled annual meeting with the Finance and Administration Committee --perhaps this could be increased. Consideration could also be given to a programme of regular committee evidence sessions with relevant commission/ers- either by the Finance and Public Administration Committee or by the relevant subject committee.”

The Scottish Public Services Ombudsman had two suggestions:

- “1) Separating financial (and possibly governance) performance and scrutiny, from operational and strategic performance scrutiny.
- 2) Whether there is a need for regular, periodic review of SPSBs. Currently changes to both individual SPSBs and the wider landscape are largely led by Government policy and legislation. But SPSBs are intended to fulfil parliamentary functions and, while there have been periodic inquiries by individual committees, there is not a clear mechanism to allow for regular review and modernisation.”

Concern was raised over the potential increase in the number of Commissioners, and the pressure this may put on existing governance arrangements. Alzheimer Scotland noted that while it:

“welcomes governance and oversight by the Scottish Parliament, we are concerned about how this can continue effectively if the number of Commissions and Commissioners grows exponentially... This will inevitably lead to increased bureaucracy. It would be our concern that the ability of the Scottish Parliament to undertake robust accountability measures would

potentially be diminished if increased demands are placed on existing arrangements, resulting in less stringent accountability going forward.”

The sixth question was on a similar theme, and asked respondents how appropriate existing lines of accountability are and how the process works in practice. It also asked what other accountability models should be considered. There were fewer submissions that answered this question, with most of the responses from existing Commissioners.

Most of the submissions were supportive of the existing lines of accountability. The Scottish Information Commissioner, for example, stated that:

“As Commissioner I have been very clear that I am accountable to the Scottish Parliament as a whole. The two manifestations of that- financial through the SPCB and performance through the Standards, Procedures and Public Appointments Committee work well for me and are understood. I feel that I can operate independently in my operations. Given the nature of my work, especially in the regulatory enforcement of Freedom of Information, I see no practical way (or indeed need) of bringing in an additional layer of accountability to the model.”

While other Commissioners agreed that existing accountability arrangements could operate well, they had suggestions on how these could be strengthened. The Standards Commission for Scotland noted that:

“the question of how well the existing lines of accountability to Parliament work in practice depends on how well (or not) the work and functions of a commissioner align to a relevant Parliamentary Committee. The Standards Commission considers the appropriateness and adequacy of accountability arrangements may also be dependent, to an extent, on how the organisations supporting each individual Commissioner are structured.”

Scottish Biometrics Commissioner agreed in part, stating:

“In my view the accountability of independent officeholders to the SPCB is strong but the accountability to Parliament is entirely dependent on how well (or not) the functions of a Commissioner align to a relevant Parliamentary Committee.”

They went on to discuss auditing arrangements and propose changes to these:

“All annual reports and accounts are the subject of separate external audits and for a small organisation with only 3 staff this feels like being stuck in a 'Groundhog Day' of perpetual audit. It also means that every officeholder must assign a significant proportion of their budget each year to pay for internal and external audit. This cannot be good value for the public purse. I contrast this with the experience of independent officeholders supported by Scottish Government (for example HMICS, Prisons or Prosecution inspectorate) who despite have bigger budgets than SBC, have their accounts swept up in the global external audit of Scottish Government without having to allocate significant budget and staff time. A move towards centralised shared services could significantly reduce the costs of internal and external audit, and free up

officeholder and staff time if it was possible for the SPCB audit arrangement to mirror SG audit arrangements in future.”

There were a couple of organisations that suggested that methods of accountability needed to be extended to include the views of individuals with lived experience. Alzheimer Scotland suggested:

“There is scope for the inclusion of people with lived experience on multi-stakeholder advisory groups or boards, or to develop separate, specific, citizen participation groups or panels to inform and influence the work of Commissions and Commissioners.”

Committee scrutiny

The final question in this section of the call for views asked whether the current model of Parliamentary committee scrutiny of Commissioners is appropriate.

The Commissioners who expressed views on this question were generally in favour of the current committee scrutiny process. The Standards Commission for Scotland noted that they had:

“no reason to consider that the Parliamentary committee scrutiny of the performance and effectiveness of how it exercises its functions is anything other than appropriate.”

There were a few comments that reflected on the fact that Commissioners may experience scrutiny differently dependent upon their role and the committee that they are linked to. The Scottish Biometrics Commissioner stated that:

“In my view the accountability of independent officeholders to the SPCB is strong but the accountability to Parliament is entirely dependent on how well (or not) the functions of a Commissioner align to a relevant Parliamentary Committee.”

A similar concern was expressed by Alzheimer Scotland:

“As with all approaches to accountability, the effectiveness of each committee will be determined by the robustness of their individual actions and their ability to obtain and understand the information they need to be able to hold a Commission or Commissioner to account.”

A couple of the submissions suggested amendments to the committee scrutiny process. The Scottish Public Services Ombudsman expressed the view that the Finance and Public Administration Committee might be best placed to scrutinise the budgets of all of the Commissioners:

“There may also be scope for Parliament to reflect on how SPSBs, specifically as accountable officers, are scrutinised. We are accountable to the SPCB for this element of our performance (including performance against budget and efficiency), assessed against the Scottish Public Finance Manual. Parliament may wish to consider whether such scrutiny would be more appropriately considered for all of us, by the Finance and Public Administration Committee. This would hold us all accountable to a single committee for this part of our

work and could provide a more direct link between budgets and organisational governance and management.”

There were also comments reflecting the belief that scrutiny needed to be Parliament-wide, and not solely within the committee structure. For example, the Human Rights Consortium Scotland stated that:

“parliamentary scrutiny should extend beyond committee boundaries. To foster a more comprehensive understanding of human rights issues, it is essential for the entire Scottish Parliament to actively engage in ongoing discussions around human rights. We recommend that the Parliament consider scheduling time for committee-led debates subsequent to the conclusion of committee scrutiny.”

Budget scrutiny

The call for views asked respondents two questions regarding the budgets of Commissioners in Scotland. They were asked to comment on whether the Commissioner model delivers value for money, and if the processes for setting and scrutinising the budgets of each Commissioner are adequate.

On the topic of value for money, most of the responses from Commissioners highlighted the work that they do, expressing the view that what they deliver for their budgets is value for money. The Scottish Information Commissioner, for example, stated:

“I cannot comment on other Officeholders but many people are astonished to learn of the small size of my team (26FTE) and of the relatively small budget (£2.4million) that I have. Delivering the quality and quantity of work to support and sustain the FOI regime in Scotland is challenging. Last year there were over 84,000 FOI and EIR requests in Scotland so I believe my office provides tremendous value for money, especially when compared to other regimes.”

The Scottish Biometrics Commissioner also felt that the Commissioner model delivers value for money, but that additional savings could also be made:

“further cost savings can be achieved in future through more sharing of core back-office functions around HR, financial processing, facilities management and ICT support. There are also opportunities to review 'estate' in pursuit of more co-location and hybrid working... there are also legitimate questions to be asked about the significant amounts of public money being paid by every Commissioner for internal and external audit. There are obvious opportunities for more centralised services around financial processing to support the transition towards unified (and less expensive) internal and external audit.”

Other organisations were concerned that there is not enough information to assess whether or not value for money is being delivered by the Commissioner system. The ALLIANCE commented:

“We do not believe there is enough information available to fully determine whether current Commissioners deliver value for money... in order to determine the value for money of Rights-Based Commissioners, it would be

necessary to produce a cost/benefit analysis of how much current Commissioners are estimated to have saved through their actions.”

Alzheimer Scotland agreed with this view, noting:

“Given that there is little research or evaluation that can point to the clear benefits of the Commissioner model, it is difficult to assess whether or not this particular approach delivers value for money. In addition, there is significant variation between the Commissioner services that currently operate within Scotland so it is difficult to assess their overall impact as a collective group. Although reporting by Commissions and Commissioners can provide an insight into the effectiveness of individual bodies, it is unable to determine whether or not this provides the best method of delivering the functions they carry out and if there would be a better approach.”

There were also those organisations, such as Enable, who felt that what Commissioners deliver means that:

“It is difficult to attach a meaningful measure of ‘value for money’ on such important interventions.”

When asked about the adequacy of the processes for setting and scrutinising the budgets of each Commissioner, there were fewer comments. Generally, the Commissioners agreed that the scrutiny process is adequate, but that the process for setting the budgets was less than ideal.

The Scottish Biometrics Commissioner discussed the gap between their budget submission and receiving confirmation of the final budget amount. They stated:

“The annual and 'individual' budget bidding and award process is problematic but the arrangements for scrutinising budget are otherwise robust... there is a gap of around 5 months between budget submission and award. Budgeting on an annual basis is difficult for medium to longer term financial planning and makes it difficult to prepare a medium term financial strategy.”

This view was supported by the submission from the Scottish Information Commissioner who also highlighted:

“The biggest difficulty is the annual budget process which, in effect, means that it is difficult to have any medium-term financial strategy or planning as there is no certainty of the funding that will be approved year on year. Similarly pay settlements late in the financial year can be challenging for resources (budget and staff), particularly if such settlements then span 2 financial years. The majority of the Commissioner’s budget is staff costs (approx. 90%) and staff are paid according the SPCB pay scales and pay settlements. In effect, this means that I have little control over these costs.”

Similar concerns were the focus of the Scottish Public Services Ombudsman’s response, which included the view that:

“there is currently a disconnect between how our budgets are set and how we are scrutinised and held accountable for how we manage and spend them. Consideration could be given as to whether SPSBs’ effectiveness in

managing their organisations could be considered in a different way (i.e, through the Finance and Public Administration Committee). Put simply, scrutiny of whether, as Accountable Officers and Office holders, do we deliver what we say we will deliver, for the budgets we are given, and did we do so efficiently and effectively? To respond to that, it is worth reflecting on what the expectation was at the point the budget was set.”

There was also an additional comments relating to the budget projections of the proposed new Commissioners. The Children and Young People's Commissioner Scotland noted:

“We have raised concerns around the budget projections for some of the new Commissioner models. There is significant risk of underfunding for new officeholders, which will not meet the expectations of the role and will make it challenging for them to have sufficient resource to deliver on their mandate and collaborate well with others.”

Overlap of functions

The final question in the call for views asked respondents if there is overlap and duplication of functions between Commissioners, and across other organisations in Scotland. It also asks how any overlap could be avoided.

The general consensus across the submissions was that currently there is little overlap between the functions of existing Commissioners. There was, however, concerns that overlaps will become more likely if the number of Commissioners continues to increase.

The Scottish Biometrics Commissioner noted that:

“I am unaware of any overlap in legal responsibilities as each has a distinct function in legislation. Usually when people think there is an overlap it relates to lack of understanding of the primary legislation.”

The ALLIANCE generally agreed with this view, stating that:

“there is currently only relatively limited overlap between Commissioners. Both the SHRC and the CYPCS could be expected to have an interest in the human rights of children and young people, and therefore could potentially overlap in their work. As yet we are not aware of this causing any particular difficulties and note that there is a working agreement between the two offices... If all the proposed Commissioners were introduced however, there could be significantly more risk of duplication”

A number of suggestions were put forward regarding avoiding potential overlaps between future Commissioners. Alzheimer Scotland commented that:

“It is important that Commissions and Commissioners have clearly defined roles and responsibilities to clarify what each Commissioner model does and how they can operate together.... Agreements with other Commissions and Commissioners who may have intersecting responsibilities must clearly identify the circumstances under which each Commission or Commissioner will operate and delegate appropriate responsibilities to ensure that adequate

coverage and high-quality support is provided in all circumstances to avoid particular issues or needs ‘falling between the cracks’. Collaborative and joint working approaches must be adopted to ensure robust, cohesive approaches in instances where multiple Commissions or Commissioners may have a specific interest, identifying a leading Commission or Commissioner who will be responsible for gathering information from, and aligning the interests of, other Commissions or Commissioners.”

Others focussed on the process of forming new Commissioners. The Carnegie UK Trust, for example, suggested that:

“Proposals for new offices should be viewed together, and against the remits of existing functions to avoid duplication. Consideration should also be given to alternative approaches that would serve to increase capacity where required (for example – SHRC rapporteur proposals), which maximise existing channels and ensure that maximum value from what is already in place.”

The Children and Young People's Commissioner Scotland was also of a similar view, stating that:

“We recommend the Committee consider reinforcing and enhancing existing criteria for agreeing new “Commissioner” bodies. This would include a detailed focus on the legislation that creates these new bodies to ensure that any new duties do not duplicate or inhibit the essential independence of existing roles, that they are appropriately constructed in terms of model and any statutory remit, and that they represent an effective use of public resources. We suggest that in the first instance, consideration should be given to enhancing the powers and resources of existing officeholders, rather than creating new ones.”

Laura Haley, Researcher
SPICe Research
27 March 2024

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Appendix A – call for views

The Committee welcomes responses to any of the following ten questions.

Closing date: 11 March 2024

Commissioner landscape

The Commissioner landscape has evolved since devolution, with seven commissioners in operation and one more recently being agreed to by Parliament. Several additional commissioners are now also being proposed.

1. Why is the Commissioner model chosen over other approaches, such as a public body or government department, and why do you consider there has been such a growth in Commissioners in recent years?
2. What are the implications of this growth on Scotland's finances, other organisations and wider society?
3. Currently, there is a mix of regulatory, investigatory, rights-based, and policy-focused Commissioners in Scotland.
 - What should the role of Commissioners be and which should report directly to Parliament (and why)?
 - Looking across the entire model of Commissioners, do you consider it to be a coherent approach? What, if any, improvements could be made to the Commissioner landscape in the future to ensure a coherent and strategic approach?
4. Criteria were developed by the Session 2 Finance Committee to help guide decisions on whether to create a new commissioner. These criteria are considered by the Scottish Government and Members when proposing Commissioner related bills.

How are the criteria working in practice and where do you consider improvements can be made to the criteria, its use, or its status?

Governance, accountability and scrutiny

The Commissioners under consideration as part of this inquiry are entirely separate to Government. The Scottish Parliamentary Corporate Body provides governance and oversight, and Commissioners are accountable to Parliament, including through scrutiny by the relevant Parliamentary committees.

5. Are the existing governance and oversight arrangements adequate and, if not, what improvements are required?
6. How appropriate are existing lines of accountability and how does the process work in practice? What other accountability models should be considered?

7. To what extent is the current model of Parliamentary committee scrutiny of the performance and effectiveness of how Commissioners exercise their functions appropriate?

Value for money and effectiveness of current approach

8. Does the current Commissioner model in Scotland deliver value for money?

9. Are the processes for setting and scrutinising the budgets of each Commissioner adequate?

10. To what extent is there overlap and duplication of functions across Commissioners, and across other organisations in Scotland and how can this be avoided?

Letter from Deputy First Minister dated 7 March 2024 relating to the Committee's Inquiry into Scotland's Commissioner Landscape: A Strategic Approach

Dear Kenneth,

I note that the Committee has commenced an inquiry examining Scotland's Commissioner landscape. I am writing to offer my reflections on the points raised by the inquiry regarding whether a more "coherent and strategic approach" is needed for the creation of any further Commissioners.

As Parliamentary Commissioners and Ombudsmen typically cover Scottish Government activity it is important to ensure independence from the Scottish Ministers. While established Commissioners are independent of central government, there is some limited influence government can have in the creation of new public bodies.

As agreed by Cabinet on 9 May 2023, the Scottish Government's Ministerial Control Framework (MCF) aims to ensure that decisions around the creation of new public bodies are made based on evidence and value for money against the backdrop of significant pressure on public spending.

The MCF includes the following three principles:

1. The Scottish Government's policy is that any new public body should only be set up as a last resort;
2. Only after consideration of all other delivery mechanisms has been exhausted, should the approval process for setting up a new public body through the Ministerial Control Framework be followed; and
3. Approval for setting up a new public body must be sought formally from Cabinet before any decision or announcement is made.

The MCF ensures there is a rigorous, consistent and transparent decision-making process for the creation of new public bodies should a proposal or consideration come from within government. Where this concerns the potential creation of a new Commissioner, MCF guidance stresses that the merits of that decision must be discussed with the Chief Executive's Office of the Scottish Parliamentary Corporate Body (SPCB) at the earliest opportunity.

While the Scottish Government has the MCF, I am aware there is not a similar control mechanism available for public bodies being proposed from outside government. Were a Bill proposing the creation of a new public body, be it a Commissioner or otherwise, to come forward from an MSP outside of government there would be no place for the MCF to act as a control mechanism ensuring best value. Instead, government can take a position on Bills that arise from out with government during the consultation stage and throughout the passage of a Bill. At these points we can outline any concerns with proposals, particularly in relation to

the costs involved. However, if MSPs decide to have a Commissioner, it will be for the Scottish Parliament to determine if it is being done in a way that is most effective. Introducing a best value assurance process for proposals coming from outside of government would be a decision for Parliament and would need to go through a Parliamentary process. It could be a viable option for the SPCB to take on that role as sponsor.

Given the current financial constraints the public sector is facing I understand the desire to consider best value when taking decisions on the establishment of new Parliamentary Commissioners. While I appreciate there has been little research in Scotland, or the UK, on Commissioners which evaluates their powers or ways of working I am aware this is not the first time these matters have been considered. Following consideration by the Finance Committee of the 2006-07 public spending budget process and its concerns about rising costs, the Parliamentary corporation requested that Audit Scotland undertake a review of the opportunities for Commissioners and the Scottish Public Services Ombudsman to share services, including the associated issue of office location. Audit Scotland also reviewed the processes for scrutinising the budgets of the Scottish Public Services Ombudsman and Commissioners, including an examination of the then existing lines of accountability and how this worked in practice. The 2009 *'Review of SPCB Supported Bodies'* also looked at the possibility of shared services across Parliamentary Commissioners, as well as the option of merging the Commissioner for Children and Young People in Scotland with the Scottish Human Rights Commission. These points are reflected in the findings of both the Scottish Human Rights Commission report *'At A Crossroads - Which Way Now for the Human Rights System in Scotland'*, and Research Scotland's report *'The Role of Commissions and Commissioners in Scotland and the UK'*.

On the back of these reports and in the context of the wider Public Service Reform programme, there are a number of options available to ensure evidencing best value is embedded as best practice within the Scottish Parliament. While the Scottish Government does not have the responsibility to put in place control mechanisms on the creation of new public bodies coming from outside government, I can see a lot of similarities between the issues raised and those that lead to the creation of the MCF. As such, I would like to restate that my officials are happy to, and have, offered support to Parliamentary colleagues by sharing their learning and understanding. However, it will ultimately be for Parliamentary colleagues to decide how to proceed.

SHONA ROBISON